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780-513--65

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 121

ALBERT BRACER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A; R. II,[1] 65a) is reported at 342 F. 2d 522.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1965 (Pet. App. B; R. II, 70a). On April 8, 1965, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including May 8, 1965, and the petition was filed on

[1] "R. II" refers to Vol. II of the record in this Court which consists of the Appendix for the Appellee in the court below with additions. "Tr." references herein are to the trial transcript.

that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, who made affirmative use of his own written confessions in his defense prior to the time such confessions were offered in evidence by the government, and whose sole objection thereafter (made at the close of the government's case) was to the voluntary nature of one of the confessions, may now urge for the first time that the confessions were obtained during an unreasonable delay in arraignment, in derogation of his right to counsel, and at a time when he was mentally incapacitated.

2. Whether the evidence was sufficient to show (1) that there was probable cause to arrest petitioner without a warrant, and (2) that the subsequent search of his apartment was made pursuant to his voluntary consent.

STATEMENT

An indictment returned in the United States District Court for the Southern District of New York charged petitioner, one Richard Solero, and another with violations of narcotics laws, 21 U.S.C. 173–174 (R. II, 1a–7a). A motion by petitioner to suppress evidence was denied after a pretrial hearing, and again at trial, and petitioner was found guilty by a jury on two substantive counts and one conspiracy count. He was sentenced to imprisonment for seven years on each count, the terms to run concurrently. On appeal, during which petitioner questioned the legality of his arrest and the search of his

apartment, as well as the sufficiency of the evidence to support the conspiracy charge, the conviction was affirmed.

1. In late 1962 and early 1963, federal narcotic agents were conducting an undercover operation (Tr. 19, *et seq.*). Agent Bailey had information from files of the Bureau of Narcotics regarding petitioner's record of narcotics violations and information from fellow agents to the effect that petitioner was a narcotics peddler (R. II, 57a). On April 1, 1963, co-defendant Solero, from whom Agent Bailey had purchased heroin, left the agent for the avowed purpose of obtaining an additional ounce (R. II, 43a–44a). Solero, who was followed by other agents, went directly to petitioner's apartment and then returned immediately to Bailey to give him the quantity of heroin (R. II, 60a–61a). On April 3, 1963, Solero told Bailey that he was going to meet his "connection" in a few moments (R. II, 44a–45a). Agents saw Solero proceed to an intersection where petitioner, driving by, repeatedly circled and motioned to Solero, but did not stop (R. II, 61a–62a, 59a). Returning to Bailey, Solero told him that he had just seen his connection but that, for some reason, the connection did not stop (R. II, 22a).

On April 8, 1963, when Solero was arrested, he told Agent Bailey that he had been obtaining his heroin from petitioner (R. II, 45a–47a). On April 10, 1963, at about 10 p.m., as petitioner was driving with his young nephew, he was stopped by Agent Bailey and three other officers (R. II, 42a–43a, 47a, 54a). Bailey, acting without a warrant, identified him-

self, placed petitioner under arrest, and searched him. Petitioner immediately admitted that as he saw the officers approaching he "got rid of" the narcotics he had with him. On the floor of the automobile, Bailey found a white powder subsequently identified as heroin (R. II, 49a, 53a).

At this point, petitioner denied that he had more heroin at his house. He then asked the officers if they would move across the boulevard to a more secluded spot since he did not want people whom he knew to see him there with the officers. The officers complied. They informed petitioner that they had a great deal of evidence against him. He said he was only an addict (see Tr. 289–292, 305–307). Agent Bailey then told petitioner that Bailey knew that narcotics were kept in petitioner's kitchen cabinet, and petitioner admitted that he had a small amount—approximately one ounce—there. When the officers said they would get a search warrant, petitioner, expressing concern that his pregnant wife and aged mother might become upset, advised the officers that they would not need a warrant. He agreed to go with them to his apartment and turn over the heroin, if not more than two officers would accompany him (R. II, 53a–55a; Tr. 307–308).

At approximately 12 o'clock, Bailey, one other agent and petitioner proceeded to the apartment (Tr. 292, 308, 512). Petitioner's wife answered their knock, and petitioner said, "it's all right." She shut the door momentarily, asking to be allowed to put on a robe (R. II, 51a). While the door was closed, Bailey told petitioner he would be "awful mad" if petitioner's

wife were "getting rid" of the narcotics, and petitioner assured Bailey that she knew nothing and would admit them (R. II, 52a). Once inside, petitioner led the way to a kitchen cabinet from which Bailey removed a brown paper bag containing 12 ounces of heroin (R. II, 56a).

2. At trial, the government's first witness was Agent Bailey, who testified regarding his dealings and conversations with the two co-defendants, the arrest of petitioner on the night of April 10, and the seizure of heroin in petitioner's automobile and apartment (Tr. 19–70). Bailey did not testify, on direct examination, to any statements taken from petitioner after the search of his apartment. He was subjected to extensive cross-examination by all defense counsel. Petitioner's counsel developed evidence that petitioner, in addition to oral admissions made at the time of arrest, had given two subsequent written statements in question-and-answer form. One of these statements had been given to Agent Bailey, in the presence of another officer, after the arrest and recovery of narcotics upon arrival at the Narcotics Bureau (at 3:30 or 4 a.m.). Petitioner was then showing preliminary symptoms of withdrawal from narcotics (Tr. 312–313, 323–334). The second statement had been given to Assistant United States Attorney Gold, in the presence of Bailey and two other agents, later that morning (at 10:55 a.m.), when petitioner had been awakened and brought to the United States Attorney's Office from a detention cell (where he was placed after making his statement to Bailey) (Tr. 336–342). Petitioner was then taken be-

fore a United States Commissioner and released upon his own recognizance (Tr. 344).

On recross-examination of Agent Bailey (following a redirect examination that made no mention of petitioner's written statements), petitioner's counsel asked to examine the statements; government counsel then requested that they be marked for identification (Tr. 361). Petitioner's counsel asked Bailey if the statement he took from petitioner was not one "that would overcome your failure to obtain a search warrant."[2] The court sustained an objection to this question on the ground that petitioner was attempting to submit secondary evidence—that the best evidence was the statement itself (Tr. 361–362).

On further redirect examination, government counsel asked Agent Bailey to identify the statement he had taken from petitioner (Tr. 363). On further recross, petitioner's counsel asked Bailey to read certain portions of the statement given by petitioner to Assistant United States Attorney Gold. In a bench conference, counsel explained that he was attempting to impeach the testimony of the agent that the officers had given no drugs to petitioner during the night of arrest (Tr. 364–367; see Tr. 293). The court sug-

[2] This statement (See Petition Appendix C) indicates that Agent Bailey was apparently interested in recording the details of petitioner's arrest and the subsequent search of his apartment. It shows that petitioner (admitting the presence of heroin in his car and apartment), although denying that he gave the officers permission to "search" his house, admitted that he told the officers that there was a small amount of heroin there, that he offered to give it to them and voluntarily took them to the apartment where he did so.

gested that this was merely a protraction of matters previously covered and counsel released the witness without further inquiry (Tr. 367).

Agent Kreppein thereafter testified on direct examination as to his surveillance activities, the arrest of codefendant Solero on April 8, and the arrest of petitioner and seizure of heroin on April 10 (Tr. 371–397). He was asked to identify the statement given by petitioner to Agent Bailey (Tr. 401). Following an extensive cross-examination during which the events of the night of petitioner's arrest were again thoroughly covered, petitioner's counsel asked Kreppein whether Assistant United States Attorney Gold, on the morning after the arrest, had asked petitioner whether the police had given him drugs (Tr. 532). When the witness replied that he did not believe the question had been raised, counsel directed his attention to a copy of the statement given by petitioner to Gold (Tr. 533). In an apparent attempt to impeach the testimony of Kreppein that he in fact had not given drugs to petitioner (Tr. 534), petitioner's counsel was permitted to read a portion of that statement (in which petitioner had been asked about his use of drugs that night), despite the objection of government counsel that he was reading from a document not in evidence (Tr. 535). Upon the further assertion that counsel wished to refresh the recollection of the witness as to whether petitioner told him he received drugs only from codefendant Solero, counsel was permitted to read questions and answers from the statement relating to the receipt of drugs (Tr. 538–541).

At the conclusion of the government's case, the statement given to Mr. Gold, with deletions agreed upon by the parties, was offered by the government and admitted into evidence without objection from the defense except for the contention that a few other portions should be excised for lack of relevance (Tr. 595–596, 593–601).[3]

At the same point in the trial, the statement given to Agent Bailey was offered and received into evidence over the objection that "[w]hile not obtained under duress, it was obtained under circumstances that may amount to physical duress" (Tr. 602). The court indicated that it would leave that question to the jury (Tr. 602–603). Petitioner's counsel then requested that the court charge the jury on voluntariness with respect to both statements (Tr. 604), and the court did so (Tr. 881). Both statements were read to the jury (Tr. 604, 605).

During his summation to the jury, petitioner's counsel, suggesting that the agents had used drugs

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[3] The statement (see R. II, 34a–40a) indicates that petitioner, after being advised of his right not to answer and his right to counsel, admitted that he had a $5 or $10 bag of heroin in his car when arrested; that he voluntarily took the officers to his apartment (though he denied that he knew he was not required to do so); and that he freely gave the agents the 12 ounces of heroin found there. It further shows that petitioner denied selling narcotics and explained that he was a user who received narcotics from Solero. Petitioner said he had last used narcotics, which he had with him, that morning at 4 o'clock in the Narcotics Bureau; that he now felt "terrible" but understood what had been discussed; that his mind was not cloudy as a result of his need for narcotics; and that he had not been threatened, promised anything, or mistreated.

as a bribe to elicit petitioner's first written statement (relative to the search of his apartment), referred to remarks in the statement given to Gold regarding the use of drugs on the morning after arrest (Tr. 834–835). And in arguing that it was Solero who had wrongfully implicated petitioner, petitioner's counsel referred to what he termed "testimony" in the Gold statement that petitioner was a drug "user" who obtained his drugs from Solero (Tr. 841). Government counsel read from the same portion of this statement in arguing knowledge of possession on the part of petitioner (Tr. 856)—which he said was shown by the initial oral admission and the two subsequently recorded ones (Tr. 854–857). During its deliberation, the jury asked for and received copies of the written statements (Tr. 899, 900, 901).

ARGUMENT

1. In this Court, petitioner urges for the first time that written confessions were obtained from him during a period of unnecessary delay in arraignment, in violation of his constitutional right to counsel, and at a time when he was "mentally disabled" by withdrawal from narcotics. See *Mallory* v. *United States,* 354 U.S. 449; *Escobedo* v. *Illinois,* 378 U.S. 478; *Townsend* v. *Sain,* 372 U.S. 293. These allegations, if established after an evidentiary hearing, would require the exclusion of petitioner's confessions from evidence. In the present case, however, petitioner not only failed to object on these grounds, but actually sought to have portions of the challenged confessions presented to the jury. The fact that petitioner him-

self first brought up the matter of the confessions and sought to use them affirmatively in his defense surely precludes any present claim based upon their admission. The record shows, for example, that before the confession made by petitioner to Assistant United States Attorney Gold was offered for admission, petitioner used it (including direct quotations therefrom) for impeachment purposes, to suggest that the statement earlier given to Agent Bailey was not credible and to buttress his defense that he was only a user of drugs who was wrongly implicated by his codefendant. It was petitioner who developed at length on cross-examination and in the presence of the jury, all the circumstances relative to the making of both challenged statements without raising the issue of their admissibility on any ground and without requesting the court to make a preliminary determination as to voluntariness. See *Jackson* v. *Denno,* 378 U.S. 368. Having followed this strategic course, petitioner should not now be heard to urge reversal on the basis of the admission of the confessions. The government's case, both as to the voluntariness of the search and petitioner's possession of narcotics, was proved, during the prosecution's evidence, by the testimony of the agents. It was only after petitioner relied on the confessions during cross and recross-examination that the government first offered the complete documents into evidence.

2. There is no occasion for this Court to review findings of both courts below that there was probable cause to arrest petitioner without a warrant and that

the search of his apartment was made pursuant to voluntary consent. The facts known to Agent Bailey at the time of arrest (see pp. 3–4, *supra*), were more than adequate to sustain an arrest without a warrant. Narcotics agents have specific statutory authority to arrest in such circumstances. 26 U.S.C. 7607. The claim that petitioner did not know that he had a right to withhold consent to the search of his apartment is unpersuasive. Petitioner was not inexperienced in matters of law; he bargained with the officers when they suggested that they were prepared to secure a search warrant, and chose to let them search under specified conditions.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

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PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

ABRAHAM GLASSER
Attorney for Petitioner
52 Eighth Avenue
New York, New York 10014

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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ARGUMENT

The Government argues that we cannot now complain of the use of the two written statements against petitioner Bracer at the trial because, the Government says, Bracer's trial counsel (Mr. Segal) himself first brought these statements to the Jury's attention.

Before we recite the chronological trial facts as to just who it was that really first brought up the two written Bracer statements and as to how they were used, the general "lay-out" of the case from the prosecution's and from each defendant's standpoint in this trial should be noted. The co-defendants Torres and Solero in effect admitted the charges of narcotic dealings with Agent Bailey; Torres claimed entrapment (Tr. 802-807; 21a); Solero (*per* his

counsel's summation to the Jury) asked only that his conviction be limited to a single count of the Jury's own selection under the multiple-count indictment (Tr. 812-813). Solero also took the stand and swore to the Jury that he had framed Bracer; that is, Solero testified that very shortly after he had deposited in Bracer's home around April 1, 1963 the substantial quantity of heroin involved in Count Seven* he became fearful that Bailey was an Agent and he decided to purchase favor for himself with Bailey by falsely "turning over" Bracer to Bailey as his (Solero's) source of supply, when in truth Bracer was nothing but an addict whom Solero had used to store this heroin, playing upon Bracer's hopes for a free "shot" (Tr. 714-716, 720-722, 725-750; and see Solero's cross-examination by the Government at Tr. 751-779 where his exculpative testimony concerning Bracer remained unshaken). Solero said his framing of Bracer began on April 3, 1963 when Solero set up a street meeting where the agents would be able to observe Solero and Bracer rendezvous-ing in a furtive manner supposedly for the purpose of Bracer's supplying heroin to Solero, when in truth Solero got Bracer to show up on that occasion through a promise of giving him a free "shot" (Tr. 726-731). It was undisputed that on April 23, 1963 Solero recanted in writing to the Agents a statement of April 8 accusing Bracer of being his source of supply, stating instead on April 23 that he (Solero) had merely used Bracer as a depository (Tr. 190-216, 739-50; Deft's Ex. A, read to Jury at Tr. 608). This second Solero state-

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* It will be recalled that Bracer was convicted under Count Six (involving the small "users" quantity swept from the floor of Bracer's automobile), Count Seven (involving the much larger quantity found in Bracer's apartment), and Count Eight (conspiracy) (Pet. Cert. pp. 4-5).

ment apparently was not made known to the Grand Jury which indicted Bracer (Tr. 215-217). In an unusual stand of professional statesmanship, Solero's trial counsel, Miss Perlmutter, told the Jury in her opening that Solero's principal objective in this trial was to undo the wrong that he had done to Bracer in having depicted the latter to the Federal Narcotics Police as a heroin source of supply rather than as a mere addict whom Solero had falsely used in an effort to save himself (Tr. 10-14); Miss Perlmutter stressed this same theme in her summation to the Jury (Tr. 816-817). Even at the sentencing—when Solero surely had nothing to gain by persisting in his exculpation of Bracer—Solero volunteered that "everything I said was the truth, and I know it was the truth" (Tr. June 16, 1964, p. 57). For additional indications, throughout the trial testimony, that Bracer surely was not a "source of supply" of heroin see, e.g., Tr. 204, 205, 215-220, 260, 608, 677-681, 695-697.

Thus, the Bracer defense knew from the outset of the trial that Bracer's whole defense position—of being an admitted narcotics addict rather than a "dope pusher"—was going to be dramatically supported by a remorseful co-defendant. And as the trial proceeded this unusual situation was to become combined with another (and, unhappily, less unusual) theme, namely, the characteristic zeal of the Federal Narcotics Bureau agents in trying to "make a case" by inducing persons under narcotic investigation to put the Bureau "in contact" with "sources of supply" (e.g., Tr. 626-660, 725-750).

In short, from the outset of the trial and increasingly as the trial proceeded it was borne in upon the Bracer defense that the fate of this hapless young narcotics addict